RAJU JAYARAMAN KERPAYA

v.

CHUNG KHIAW BANK LTD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: P-02-136-1995]
23 APRIL 1997

BANKING: *Securities for advances - Loan secured by deed of assignment and guarantee - Whether debt extinguished by the deed of assignment if absolute - Whether guarantee still extant - Whether guarantee could be enforced - Policy considerations*

EQUITY: *Estoppel - Mutuality - Whether necessary - Whether estoppel only binds the parties thereto*

The respondent, a bank, had given a loan of RM1,000,000 ('the loan') to one Hipparion (M) Sdn. Bhd. ('Hipparion'). The loan was secured by two separate instruments, *viz.*, a deed of assignment ('the assignment') by which Hipparion had absolutely assigned its right, title and interest in a piece of property ('the property') to the respondent, and a guarantee ('the guarantee') executed by the appellant as a director of Hipparion. (The assignment was resorted to because the property had no separate strata title capable of being subject to a registered charge.) As it transpired, Hipparion defaulted on the loan and the respondent enforced the assignment by seeking a declaration of the sums due to it under the loan as well as orders for vacant possession and for the sale of the property. The High Court acceded and, on appeal, the Supreme Court affirmed the orders of the High Court.

As the proceeds from the sale of the property were insufficient to meet Hipparion's liability under the loan, the respondent sued the appellant upon the guarantee. The High Court entered judgment for the respondent and the appellant appealed to the instant Court. Counsel for the appellant contended thus: that the respondent had taken the assignment of the property as consideration for the loan; that the assignment was not a mere security but was absolute as was canvassed by the respondent and upheld by the Supreme Court against Hipparion in the earlier proceedings; that the respondent could not now argue that the assignment was by way of security only; and that

based upon the law governing consideration for contracts, the debt had been extinguished by the assignment and, consequently, the guarantee was not extant and, therefore, not available for enforcement.

Held:
Per Gopal Sri Ram JCA

[1] The appellant's contention – that the assignment, being absolute, had satisfied the loan in full upon its execution – overlooked the fact that the point under discussion, *viz.*, whether the assignment was absolute or was by way of charge only, arose in the earlier proceedings between the respondent and Hipparion in a procedural context. The earlier finding of both the High Court and the Supreme Court that the assignment was absolute was made in the context of the **procedure** adopted by the respondent to effect the sale of the property.

[1a] Thus, in principle, the debt owed by Hipparion could **not** have been extinguished by the assignment of the property to the respondent.

[1b] Countenancing the appellant's contention will have the effect of frustrating the recovery of loans in all cases where the financier takes an absolute assignment in the absence of a title capable of being subject to a registered charge. As a matter of **policy** this will be unacceptable. No financier will ever lend money if the law is to declare all sums due under a loan agreement irrecoverable because a deed of assignment absolute has the effect of extinguishing the debt.

[2] Despite its flexibility, the doctrine of *estoppel* has certain requirements that constitute its hallmarks. One such hallmark is the requirement that an *estoppel*, whether procedural or substantive, must be **mutual**. An *estoppel* only binds the parties thereto.

[2a] The appellant was a stranger to the earlier proceedings between the respondent and Hipparion. The determination of the issues in the earlier proceedings did not in any way affect his rights. The proceedings taken by the respondent against the appellant to enforce the guarantee were separate and distinct from the earlier proceedings. There was no mutuality between the parties and, therefore, the appellant's argument failed.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PERBANKAN: *Jaminan untuk pendahuluan - Pinjaman dijamin oleh suratikatan penyerahhakan dan jaminan - Samada hutang diluputkan oleh suratikatan penyerahhakan jika mutlak - Samada gerenti masih wujud - Samada gerenti boleh dikuatkuasakan - Balasan polisi*

EKUITI: *Estopel - Bersalingan - Samada perlu - Samada estopel hanya mengikat pihak-pihak kepadanya*

Responden, sebuah bank, telah memberikan satu pinjaman sebanyak RM1,000,000 ('pinjaman tersebut') kepada sebuah syarikat yang dikenali sebagai Hipparion (M) Sdn. Bhd. ('Hipparion'). Pinjaman itu telah dijamin oleh dua suratcara yang berasingan, iaitu, satu suratikatan penyerahhakan ('penyerahhakan tersebut') melalui yang mana Hipparion telah secara mutlak menyerahhak hak, hakmilik dan kepentingannya dalam sebidang hartanah ('hartanah tersebut') kepada responden, dan satu gerenti ('gerenti tersebut') yang telah disempurnakan oleh perayu sebagai seorang pengarah Hipparion (Penyerahhakan itu telah dilakukan kerana hartanah tersebut tidak mempunyai hakmilik strata yang berasingan yang boleh dijadikan suatu gadaian berdaftar). Sepertimana yang berlalu, Hipparion telah memungkiri pinjaman itu dan responden telah menguatkuasakan penyerahhakan itu dengan berusaha untuk mendapatkan suatu pengisytiharan akan jumlah yang kena dibayar di bawahnya dan juga perintah untuk milikan kosong dan untuk jualan hartanah tersebut. Mahkamah Tinggi telah bersetuju dan, ketika rayuan, Mahkamah Agung telah mengikrarkan perintah-perintah Mahkamah Tinggi.

Oleh kerana hasil daripada penjualan hartanah tersebut tidak mencukupi untuk memenuhi tanggungan Hipparion di bawah pinjaman itu, responden telah mendakwa perayu berdasarkan gerenti tersebut. Mahkamah Tinggi telah memasukkan penghakiman bagi responden dan perayu telah merayu kepada Mahkamah ini. Peguam bagi pihak perayu menegaskan sedemikian: bahawa responden telah mengambil penyerahhakan hartanah tersebut sebagai balasan bagi pinjaman tersebut; bahawa penyerahhakan itu bukannya semata-mata suatu jaminan tetapi adalah mutlak seperti yang diusahakan oleh responden dan dibenarkan oleh Mahkamah Agung terhadap Hipparion dalam prosiding yang lebih awal; bahawa responden kini tidak boleh berhujah bahawa penyerahhakan itu adalah melalui jaminan sahaja; dan bahawa berdasarkan undang-undang yang menguasai balasan bagi kontrak-kontrak, hutang tersebut telah pun dilupuskan melalui penyerahhakan dan, akibatnya, gerenti tersebut tidak wujud dan dengan itu, tidak terdapat untuk penguatkuasaan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Penegasan perayu – bahawa penyerahhakan itu, yang dikatakan mutlak, telah menjelaskan pinjaman tersebut sepenuhnya apabila ianya disempurnakan – tidak menghiraukan fakta bahawa perkara yang dirundingkan, iaitu, samada penyerahhakan itu adalah mutlak atau adalah hanya melalui gadaian sahaja, berbangkit dalam prosiding awal antara responden dan Hipparion dalam konteks prosedur. Keputusan awal kedua-duanya Mahkamah Tinggi dan Mahkamah Agung bahawa penyerahhakan tersebut adalah mutlak telah dibuat dalam konteks prosedur yang diterima-pakai oleh responden untuk menguatkuasakan jualan hartanah tersebut.

[1a] Dengan itu, menurut prinsip, hutang yang dihutang oleh Hipparion tidak boleh dilupuskan oleh penyerahhakan hartanah tersebut kepada responden.

[1b] Menyetujui penegasan perayu akan mempunyai kesan mengecewakan pemerolehan kembali pinjaman-pinjaman dalam kesemua kes di mana pembiaya mengambil penyerahhakan yang mutlak dalam ketiadaan hakmilik yang boleh dijadikan suatu gadaian berdaftar. Sebagai dasar, ini tidak akan diterima. Tidak satu pun pembiaya yang akan meminjamkan wang jika undang-undang harus mengisytiharkan kesemua jumlah yang kena dibayar di bawah satu perjanjian pinjaman tidak boleh diperolehi semula kerana satu suratikatan penyerahhakan mutlak mempunyai kesan melupuskan hutang itu.

[2] Sungguhpun ianya mudah dilentur, doktrin estopel mempunyai kehendak-kehendak tertentu yang membentuk ciri nya. Salah satu ciri nya adalah kehendak bahawa sesuatu estopel, samada berbentuk prosedur atau substantif, mestilah bersaling. Sesuatu estopel hanya mengikat pihak-pihak kepadanya.

[2a] Perayu adalah orang yang tidak dikenali dalam prosiding awal antara responden dan Hipparion. Penentuan isu-isu dalam prosiding awal tidak dalam apa cara pun menjejaskan haknya. Prosiding yang dimulakan oleh responden terhadap perayu untuk menguatkuasakan gerenti tersebut adalah berasingan dan berbeza daripada prosiding yang awal. Tidak terdapat kebersamaan antara pihak-pihak tersebut dan, dengan itu, penghujahan perayu gagal.

[Rayuan ditolak.]

Cases referred to:

Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. [1995] 4 CLJ 283 ***(cit)***

Low Lee Lian v. Ban Hin Lee Bank Bhd. [1997] 2 CLJ 36 ***(cit)***

In re Waring [1948] Ch. 221 ***(cit)***

China & South Sea Bank Ltd. v. Tan [1989] 3 All ER 839 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Rules of the High Court 1980, O. 31, O. 83

Other sources referred to:

Res Judicata, Spencer Bower & Turner, 2nd Edn., p. 212

[Appeal from High Court Malaya, Pulau Pinang; Suit No: 22(23)-248-88]

For the appellant - K.S. Narayanan (Saranjit Singh & S. Murthi with him); M/s. Jayaraman, Ong & Co.

For the respondent - Tommy Thomas (V. Arivanandhan with him); M/s. Cheong Wai Meng & Van Buerle

JUDGMENT

Gopal Sri Ram JCA:

This appeal arises from a decision of the High Court at Penang whereby judgment was entered against the appellant in the sum of RM1,638,520.04 together with interest and costs. Because the learned Judge has, in his judgment dealt admirably with the relevant facts and chronology, we are spared their regurgitation. Suffice that we re-state, in a summary form, only those facts that are salient to the arguments raised before us in this appeal.

The respondent is a licensed bank. In August 1983 it lent RM1,000,000 to a company called Hipparion (Malaysia) Sdn. Bhd. ('Hipparion'). The terms upon which the loan was to be repaid were set out in an agreement ('the Loan Agreement') entered into between the respondent and Hipparion. The loan was secured by two separate instruments. The first of these was a deed of assignment under which Hipparion absolutely assigned its right title and interest in a floor of a building ('the subject property') to the respondent; the second, a guarantee executed by the appellant who is a director of Hipparion.

Hipparion failed to meet its obligations under the Loan Agreement. So, the respondent took steps to recover its money. It enforced the assignment by seeking a declaration of the sums due to it under the Loan Agreement as well as an order for vacant possession of the subject property and liberty to sell the subject property either by public auction or by private treaty. The High Court granted the relief claimed. Hipparion then appealed to the Supreme Court

which affirmed the orders made by the Court below and dismissed the appeal. The judgments of the High Court and the Supreme Court are reported. See, [1988] 2 MLJ 62; [1989] 2 MLJ 149.

One of the arguments raised by Hipparion in support of its appeal was that for the purposes of s. 4(3) of the Civil Law Act 1956 the deed of assignment was not absolute, but by way of charge only. That submission was rejected by a strongly constituted Bench of the Supreme Court which held that the deed of assignment of the subject property was absolute in nature.

The proceeds from the sale of the subject property were insufficient to meet Hipparion's liability to the respondent in full. The respondent therefore sued the appellant upon his guarantee. That is the suit which forms the subject matter of the present appeal. In the High Court the appellant raised a number of defences all of which failed before the Judge who entered judgment for the respondent. We would, for completeness, mention that the appellant elected not to give evidence at the trial.

Of the arguments addressed to us, we find that only one merits consideration. It has to do with the effect of the deed of assignment. The argument runs thus.

On a proper construction of the Loan Agreement and the other contemporary documents, it is clear that the respondent took an assignment of the subject property as consideration for the loan. It was not a mere security because the Supreme Court had in the earlier proceedings between the respondent and Hipparion held the deed to be absolute. That finding was based upon a sustained submission by the respondent that the assignment of the subject property was absolute and not by way of charge only. The respondent cannot now argue that the deed was by way of security only. It would be unjust to permit such an argument to prevail. Applying the law governing consideration for contracts, the debt was extinguished by the assignment. The guarantee was therefore not extant and consequently not available for enforcement.

We must say at once that when we first heard it, we found this argument had the qualities of both attractiveness and ingenuity. However, having heard the carefully formulated response from Thomas of Counsel for the respondent, we came to the conclusion that the appellant's submission was, on closer examination, devoid of merit. Our reasons for rejecting the appellant's argument are as follows.

It must be borne in mind that the subject property had no separate strata title. The appellant wished to borrow in order to purchase the subject property and the respondent was desirous of making the loan. The machinery of a registered charge under the National Land Code 1965 and the remedies provided therein

to a chargee against a defaulting chargor were accordingly unavailable. Yet, it was essential for the respondent to be in a position to have recourse against the subject property in the event that Hipparion defaulted in making repayment of the loan. That is why the device of a deed of assignment was resorted to by the parties. Since the assignment was absolute by the terms of the relevant deed, no question of an equitable charge arose.

When Hipparion failed to meet its obligations under the Loan Agreement, the respondent had to take such steps as were necessary to recover the principal and interest. The procedure prescribed by O. 83 of the Rules of the High Court 1980 did not apply to the fact pattern because there was neither a registered nor an equitable charge. The appropriate procedure was that made available by O. 31 of the Rules. And that is the procedure that was resorted to by the respondent and sanctioned by the Supreme Court.

The argument that the deed of assignment was absolute and therefore satisfied the loan in full upon its execution overlooks the fact that the point under discussion, namely, whether the deed was absolute or by way of charge only, arose in the earlier proceedings between the respondent and Hipparion in a procedural context. It was never Hipparion's case in the earlier proceedings that its debt had been extinguished upon the execution of the deed in question. A careful reading of the judgment of Edgar Joseph Jr. J (as he then was) at first instance and that of Gunn Chit Tuan SCJ (later CJ, Malaya) delivered on behalf of the Supreme Court make these matters plain. It therefore follows as a matter of principle that the finding by the Courts at all levels in the Hipparion proceedings that the deed of assignment was absolute and not by way of charge only was made in the context of the procedure adopted by the instant respondent to effect a sale of the subject property.

With respect, we do not see the decision of the Supreme Court in the Hipparion proceedings as facilitating the argument that the debt owed by Hipparion had been extinguished by the absolute assignment it gave the respondent. Both principle and policy lie against the opposite conclusion. The principle we have already adverted to. As far as policy is concerned, countenancing the appellant's argument would have the effect of frustrating the recovery of loans in all cases where a financial institution takes an absolute assignment because there is unavailable a title capable of being subject to a registered charge. The construction and sale of multi-storeyed residential and commercial premises would grind to a halt because no financier will ever lend money if the law were to declare all sums due under a loan agreement irrecoverable because a deed of assignment absolute of particular premises has the effect of extinguishing the debt. We are unable to countenance a proposition that would produce so radical an effect.

The second reason for rejecting the appellant's argument is to be found in the doctrine of estoppel. What in effect the appellant says is this. In the Hipparion proceedings, the respondent claimed that the deed created an absolute assignment. Now, in the action against the appellant guarantor it is claiming that the purpose of the deed was only to seek recovery of the loan in the event of a default. In other words, it is a security document and not a deed of absolute assignment. It is unjust to permit the respondent to succeed by blowing both hot and cold. The respondent should be therefore estopped from deviating from the stand it took in the Hipparion proceedings.

Now, of the doctrines invented by the Court of Chancery, estoppel is surely the most flexible. It is a rule by which a Court does justice between parties to a litigation according to the facts and substantial merits of the case. The only question at issue where estoppel is relied upon is whether it is just that the party sought to be estopped ought to succeed upon a particular issue or in the action generally, as the case may be. See, *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283.

However, despite its flexibility, the doctrine has, woven into its basic fabric, certain requirements that constitute its hallmarks. One such hallmark is the requirement that an estoppel, whether procedural or substantive, must be mutual. See, *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36. We are here concerned with estoppel in the procedural realm.

The appellant was not a party to the Hipparion proceedings. Neither is he, as a director of Hipparion, its representative in interest. He is therefore a stranger to the Hipparion proceedings. The determination of the issues in those proceedings did not in any way affect his rights. The proceedings now taken against him to enforce the guarantee are separate and distinct from the Hipparion proceedings. Accordingly, there is no mutuality between the parties or interest. Another way of stating the proposition is to say that an estoppel only binds the parties thereto. In the realm of equity form is irrelevant: it is substance that matters. So it does not matter what form of words are used to state the proposition. The effect is all that matters.

The view which we take of the law is supported by the following passage from Spencer Bower and Turner on *Res Judicata,* 2nd Edn., p. 212:

> But there may be a type of question which when asked of one litigant as regards A. is identical with the same question asked of him as regards B. An example is the construction of a document or a statute as it affects (say) trustees and a beneficiary A., and of the same passage in the same document or statute affecting the same trustees as against beneficiary B., where A. and B. are mentioned in the document or statute, not by name, but as members of a class between whom no distinction is made. It would seem here that an interpretation of a document

> or statute contained in a judgment to which A., and not B., is a party, will not bind B., who may thereafter, in other proceedings, contend for a different and more favourable construction as regards himself.

The footnote cites *In re Waring* [1948] Ch. 221 as illustrating the proposition stated in the passage above quoted.

Absent mutuality, the appellant's argument cannot stand. Hence there is no injustice done to him if the respondent goes behind the four corners of the deed of assignment to show the true purpose for its creation. In this we are entirely in agreement with Encik Thomas.

It is trite that a creditor is entitled to pursue all the remedies available to him in law and in equity for the purpose of recovering moneys due to him from the debtor and his surety. As observed by Lord Templeman when delivering the advice of the Privy Council in *China & South Sea Bank Ltd. v. Tan* [1989] 3 All ER 839, 842:

> The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.

We consider the instant appeal as merely illustrative of this principle.

An examination of the learned Judge's judgment discloses no error or misdirection on his part. Indeed, we are entirely satisfied that the learned Judge sufficiently appreciated the evidence before him and correctly directed himself upon the applicable law.

Having come to the conclusion that the appeal lacked merit we dismissed it and made those orders that are usually consequent upon a dismissal.

Reported by Alex KC Lee